Filed 09/20/16 In re Jeremiah B. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JEREMIAH B., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. DIANA S., Defendant and Appellant.	A147005 (San Francisco County Super. Ct. No. JD14-3247)

This is the second time this dependency has been here. Last year, we denied the petition of Diana S., the mother of the dependent minor, to halt the hearing at which parental rights might be terminated when the San Francisco Juvenile Court selected a permanent plan for the minor pursuant to Welfare and Institutions Code[1] section 366.26. (*Diana S. v. Superior Court* (Sept. 25, 2015, A144879) [nonpub. opn.].) That hearing was held on October 20, 2015. The brief reporter's transcript shows the following:

The hearing opened with the city counsel, representing the San Francisco Human Services Agency (Agency), stating her appearance for the record. In the course of doing so, the city counsel stated: "Present . . . is Mark Wasacz on behalf of the mother, Diana

[1] Statutory references are to this Code.

S[.] Diana S[.] just entered the courtroom, said hello, and exited the courtroom." Mr. Wasacz explained: "As the City Attorney noted, my client went back and forth about whether to be here. She felt it important that the Court saw that she was here, but it's a very difficult morning for her so she decided to step outside and not be present for the proceeding." Mr. Wasacz continued:

"Just for the record, Your Honor, if I might, she, my client has made a request for a continuance, although I don't really understand the basis for that. But for the record she wanted me to note that.

"She objects to the recommendation.

"For the record, because I think I am going to have some lawyers looking over my shoulder, I will note that as to the issue of adoptability, I believe there is case law that if a minor is with the de facto prospective adoptive parent, that common sense dictates that in and of itself makes the minor adoptable.

"And then turning to the exceptions to the statutory preference for termination at this stage, the only exception which would be available to Ms. S[.] would be the parental bond exception. As the Court knows, the first prong of that is regular and consistent visitation, and Ms. S[.] only has monthly supervised visits. So we cannot meet that prong, and therefore do not reach the second prong about the nature of the bond.

"Ms. S[.] objects to . . . the Agency's refusal . . . to negotiate a post-adoption contact agreement.

"Ms. S[.] objects to the termination of her visitation. And Ms. S[.] is requesting a closure visit.

"Lastly, as I circulated to all counsel, Ms. S[.], were she here, intended to read a statement, and she's asked me to present that statement to the Court. I am not seeking to have it entered into evidence, but just so that the Court knows and my client knows that I complied with her request. So if I could approach?

"THE COURT: You may. Thank you Mr. Wasacz

"MR. WASACZ: And that is the end of my comments."

After hearing from Jeremiah's counsel, who supported the Agency's recommendation to terminate parental rights, and determining that Mr. Wasacz did not have "anything further," the court heard the following from counsel for the Agency:

"So I appreciate Mr. Wacasz's comments that he made earlier. And of course the Agency objects to the mothers request for a continuance. It doesn't sound like there is any cause for that request.

"And as Mr. Wasacz noted, this minor is clearly adoptable. He is both generally adoptable and it appears specifically adoptable since he has a caretaker who is willing and committed to adoption. We have a healthy young boy who has no issues that would preclude him from finding an adoptive family should anything happen to his current caretaker.

"And with respect to anything that would preclude the Court moving forward on the Agency's request today, the only available exception would be the parent-child bond exception, and there is no evidence before the Court that would make that exception applicable such that it would overcome the benefit of adoption here today.

"And the post-adoption contact agreement, we did make a referral for that. It's my understanding . . . that would not be something that they could do given the restraining order and some of the other issues that the Court is aware of.[2]

"The Agency would like to provide the mom with a closure visit. However, given how the last visit escalated, we have serious concerns about the safety of the minor in a

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[2] As we stated the first time the matter was here: "Jeremiah was detained and placed with his paternal grandmother. After [Ms. S.] threatened Jeremiah's presumed father and attacked the paternal grandmother, counsel for Jeremiah secured a restraining order directing [Ms. S.] to stay away from Jeremiah, his father, and the paternal grandmother. [Ms. S.'s] mother had her own restraining order against petitioner." (*Diana S. v. Superior Court, supra,* at p. 2, fn. omitted.) We also noted that the juvenile court had found that Diana S. had violated the orders "on multiple occasions." (*Id*., at p. 7.)

Jeremiah has been with his grandmother since he was detained in July 2014. It is she who proposed to adopt him.

closure visit. And for that reason we would object to a closure visit after today's hearing."

There followed an off-the-record discussion, and the court then stating: "We have been talking at some length about the usefulness, wisdom about having a further admonishment of mother with respect to the restraining order that remains in place to which she is subject but which she has continued to violate. And the discussion has been centered on whether there would be anything gained by the Court once again admonishing her, or whether since she is very aware of the restraining order, that to further admonish her would possibly exacerbate the situation. [¶] So let me ponder that while I make my orders this morning and then will let you know what I think."

The court then ruled on the Agency's recommendation: "[T]he Court has read and considered the assessment report prepared by the [Agency],[3] . . . as well as the

[3] The report has a number of interesting points. "Ms. S[.] has been hostile towards [Jeremiah's caregiver] since immediately after Jeremiah was first placed with her despite the fact that Ms. S[.] asked that Jeremiah be placed in [the caregiver's] home." After refusing for five months to submit to supervised visits, "the mother . . . started visiting Jeremiah . . . . However, their visits are limited since reunification was terminated" and "[D]ue to the mother's assaultive behavior towards Jeremiah's caretaker and Jeremiah's father and the on-going disparaging . . . comments the mother continues to make about the caretaker and father, it seems unlikely that the [Agency] will be able to recommend contact between the mother and Jeremiah post adoption."

The assessment behind the Agency's recommendation for termination of parental rights and approving adoption as the permanent plan was as follows: "Both of Jeremiah's parents have significant mental health diagnoses and histories of multiple psychiatric hospitalizations. . . . Ms. S[.] recognized during her pregnancy that she was not in a good place in her life to raise a child and explored the possibility of adoption. After leaving Jeremiah with [the grandmother caregiver], she realized she very much wanted to raise her son. Ms. S[.] changed her mind about the guardianship plan with [the caregiver], and tried to raise Jeremiah on her own but, sadly, her poorly managed mental health, lack of insight and erratic behavior made it clear she could not safely care for him. Given [the caregiver's] stable, ongoing, loving support it has become clear that it is in Jeremiah's best interest to be raised by his paternal grandmother [who] is the only primary caregiver Jeremiah recognizes and [who] . . . is strongly bonded to Jeremiah and fully committed to raising him to adulthood."

addendum[4] . . . in which the Agency was renewing its recommendation of termination of parental rights . . . .

The Court . . . [¶] takes judicial notice of all prior findings, orders, and judgments in the proceeding. And the Court previously made a finding denying or terminating reunification services . . . ."

At this point the record shows that "mother, Diana S[.] enters courtroom," and told the Court: "I am here. You want to scold me?

"THE COURT: Do you want to check in with your client, Mr. Wasacz?

"MS. S[.]: Whatever you have to say, you can say it.

"(Discussion off the record)

"THE COURT: Let's go back on the record. And we will note that everyone has returned to the courtroom and that Ms. S[.] has joined us. [¶] And I had been handed up a short while ago a statement that Ms. S[.] . . . had crafted, and I believe everybody had an opportunity to see the statement and the Court has reviewed it as well. Thank you Ms. S[.][5]

"MS. S[.]: I wanted to read it but I didn't think I had the strength.

"THE COURT: So I will continue on with the findings. And the Court will make a finding that there is clear and convincing evidence that it is likely that Jeremiah will be adopted. And at this time the parental rights of mother . . . are terminated. Adoption is Jeremiah's permanent plan."

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[4] In the addendum, the Agency case worker described how at the most recent visit "Diana very quickly escalated and became verbally abusive" towards a staffer of the institution at which supervised visitation had been held. The court was advised that that institution "could no longer supervise the visits due to the mother's threatening behaviors." The caseworker concluded that "Due to the mother's continued abusive and threatening behaviors, visitation between her and her son, Jeremiah . . . , is not safe nor is it in the best interest of Jeremiah."

[5] In the record is an undated, unsigned, two-page document that was obviously composed by Diana S. and is probably the "statement" to which the court referred.

"THE COURT: And with respect to mother, the Court will find that visitation is detrimental to the child's physical or emotional well-being, and it is terminated at this time."

The court concluded the hearing by "remind[ing]" mother "about the restraining order that is in place and that you are subject to. And that you are not to contact the caretaker or be in touch with her in any way . . . ."

Ms. S[.] submitted a "Motion for Reconsideration" she had drafted, enumerating "eight points of change in circumstance and/or new evidence." The court summarily denied the "petition" the next day.[6]

Ms. S. (hereafter appellant), perfected this timely appeal, advancing a single contention, namely, that Mr. Wasacz's performance at the hearing amounted to ineffective assistance of counsel. This contention is to be evaluated according to well understood standards.

A party must meet the two requirements in order to prevail in an ineffective assistance of counsel claim relating to a dependency proceeding. " 'First, there must be a showing that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." [Citations.] Second, there must be a showing of prejudice, that is, [a] "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citation.]' " (*In re Athena P.* (2002) 103 Cal.App.4th 617, 628.)

It is also important to understand the precise scope of the proceeding in order to understand the nature of Mr. Wasacz's duties.

After it has been adjudicated that a child is a dependent of the juvenile court, the exclusive procedure for establishing the permanent plan for the child is the selection and

[6] The record does not show a ruling by the Court on Ms. S[.]'s pending motion to change its order on visitation. The month before the hearing the court had denied a similar motion on the ground that it "did not state new evidence or a change of circumstances."

implementation hearing as provided under section 366.26. The essential purpose of the hearing is for the court "to provide stable, permanent homes for these children." (§ 366.26, subd. (b); see *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1797.) There are seven statutory choices for the permanency plan. The preferred choice is adoption, coupled with an order terminating parental rights. (§ 366.26, subd. (b)(1).) The court selects this option if it "determines . . . by a clear and convincing standard, that it is likely the child will be adopted." (*Id.*, subd. (c)(1).) Thus, at the .26 hearing, "in order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250.)

Where a parent is represented by counsel in a dependency proceeding, it will be presumed, in absence of evidence to the contrary, that trial counsel was competent and advised the parent of his or her hearing rights. (*In re Angel R.* (2008) 163 Cal.App.4th 905, 909 ["a presumption in support of counsel's performance exists"]; *In re Elizabeth G.* (2001) 88 Cal.App.4th 496, 503 ["There is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' "].) An appellate court will not assume that dependency counsel's challenged actions or omissions was "the result of negligence" where the record permits the inference that counsel's action may have been "based upon some practical or tactical decision governed by client guidance." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.)

"When a claim of ineffectiveness of counsel is raised on appeal, we examine the record to determine if there is any explanation for the challenged aspects of representation. If the record sheds no light on why counsel failed to act in the manner challenged, the case is affirmed 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' " (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 255.)

So, what did Mr. Wasacz do or not do that appellant thinks he ought to have done or not done? The particulars are few. She does not argue that appropriate investigation

was left undone. Appellant does not assert Mr. Wasacz should have been more zealous in seeking a continuance. Appellant does not identify witnesses—including herself—who ought to have been called, or what the sum of their testimony would have been. Appellant makes much of her absence from the hearing, but that was clearly her choice, and it is difficult to conceive how counsel could have compelled her presence. Mr. Wasacz had to proceed in light of appellant's decision to remove herself from the courtroom. (*In re Arturo A.*, *supra*, 8 Cal.App.4th 229, 243.)

A careful reading of appellant's briefs discloses that she now objects to Mr. Wasacz's general approach to the hearing, and his general conduct at the hearing. Thus, he is criticized because he "argued against [her], and in fact argued the Agency's case for it." Appointed appellate counsel expands: "Diana's trial attorney did something no attorney should *ever* do. Not only did he cede to the Agency's position, he preemptively sabotaged Diana's ability to assert the only impediments to termination of parental rights; he did so in opening statements, and he did so before the Agency even had a turn to speak. Moreover, Diana's trial attorney did this while Diana was not even present, waiting outside the courtroom in anguish, and counsel did this so 'effectively,' the Agency really had no need to argue."

Again, the absence of supporting particulars is telling. Appellant does not try to prove that any of Mr. Wacasz's legal or factual conclusions was incorrect. She does not specify what "impediments to termination of parental rights" were available and should have been pushed. She does not claim that the Agency incorrectly concluded that Jeremiah was adoptable. She does not deny that, as Mr. Wasacz noted, visitation is central to finding the existence of a continuing parent-child bond (see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575) that might defeat termination. (See § 366.26, subd. (c)(1(B)(i).) She does not identify what Mr. Wasacz should or could have argued to overcome appellant's poor record on visitation (see fns. 3–4, *ante*), yet she blasts him for "giving away the proverbial farm" and thus denying her "the opportunity to explore the only set of facts which may have prevented termination of parental rights."

In her words, "trial counsel simply folded," "punted," and "did not hold the Agency's feet to the fire."

Such does not take account of the record on appeal, and sheds no light on why counsel acted or failed to act in the manner challenged. Appellant deems it a "pointless concession" that cannot qualify as a defensible tactical decision, and is "per se prejudicial," thus escaping the rule requiring affirmance on appeal. The language is colorful, but cannot overcome the imposingly unfavorable state of the record. Argument for argument's sake is not a tactic that will commend itself to attorneys. What was Mr. Wasacz to "explore," particularly with appellant having voluntarily withdrawn from the courtroom? What evidence was he to employ in such an exploration? There are numerous decisions by our Supreme Court holding that a criminal trial counsel is not required to present arguments which he or she concludes lack merit and have no reasonable chance of success. (E.g., *People v. Stanley* (2006) 39 Cal.4th 913, 954; *People v. McPeters* (1992) 2 Cal.4th 1148, 1173; *People v. Price* (1991) 1 Cal.4th 324, 387.) No reason suggests itself why the same principle is not applicable to dependency counsel. Because there is a satisfactory explanation for Mr. Wacasz's strategy, affirmance is required. (*In re Merrick V., supra,* 122 Cal.App.4th 235, 255.)

The same conclusion can be reached by a different path. Our Supreme Court has also cautioned that to secure reversal on an ineffective assistance claim, the appellant "must prove prejudice that is a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Appellant has not carried this burden, which is a separate and independent ground for our decision. (See *In re Elizabeth G., supra*, 88 Cal.App.4th 496, 503 [" . . . 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed.' "].)

The order is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

_____
Stewart, J.

A147005; *In re Jeremiah B.*